In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1055

NICK FALBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania in one count charging that, having been classified as a conscientious objector and having been placed in Class IV–E by his local board, he wilfully failed and neglected to perform duties required of him under the Selective Training and Service Act of 1940 and regulations promulgated thereunder, pursuant to his assignment to work of national importance (R. 82–83). He filed a plea in abatement on the grounds that he had been a "regular minister of religion" since 1931 and a "duly ordained minister" since September 1, 1940, and

was therefore exempt from training and service, and that the court was without jurisdiction because he had valid reasons for having failed to perform the duty required of him, namely, that the local board had wrongly classified him and had acted arbitrarily and capriciously and in violation of the Selective Service Regulations (R. 3–4). The plea was overruled (R. 9).

At the trial before a jury (R. 8), the clerk of the local board testified that petitioner was classified in "Tentative 1" by the local board on August 25, 1941 (R. 11); that he appealed this classification on January 26, 1942, and was classified 1–A by the board of appeal (R. 11–12); that he "again submitted evidence" to the board of appeal and asked that his file be returned to that board; and that on June 17, 1942, the board of appeal classified him 4–E, as a conscientious objector, by a vote of four to nothing (R. 12).[1] In accordance with the directions of the State Director of Selective Service, the local board notified petitioner on August 21, 1942, that he had been

[1] The testimony of the clerk does not conform in all respects with the notations appearing on page 8 of petitioner's Selective Service Questionnaire, which was introduced in evidence (R. 11, 13). According to these notations petitioner was classified 1–A by the local board on January 19, 1942. His notation of appeal is dated January 26, 1942, and the action of the board of appeal in classifying him 1–A is dated January 24, 1942. The minute of this action by the board of appeal states that it was "subject to question of conscientious objection" and that the case was referred to

assigned to work of national importance under civilian direction at Civilian Public Service Camp No. 46 at Big Flats, New York, and ordered him to report to the local board on September 2, 1942 (R. 13–14, 59). Petitioner failed to report as ordered (R. 15).

In his Selective Service Questionnaire petitioner stated his occupation to be "'Pioneer' for Watchtower Bible and Tract Society," that he worked as a "'Minister' Preaching the Gospel of God's Kingdom," that he had had 11 years experience in this work, and that he received no earnings from it (R. 52). He also stated that he had worked as a clerk selling clothing from 1937 to 1939 (R. 54). In the section of the questionnaire provided for ministers and students preparing for the ministry, he claimed that he had been a minister of religion of the Watchtower Bible and Tract Society since July 1, 1930, that he was formally ordained by the Society on that date, and that he customarily served as a minister (R. 56). In addition, he stated that by reason of religious train-

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the Department of Justice on that date. Following his classification in Class 4–E by the board of appeal on June 17, 1942, the local board reclassified him 4–E on July 15, "as per classification recommendation of the Appeal Board" (R. 58). The notation of reclassification in Class 4–F appearing at the bottom of page 8 (R. 58) is dated January 5, 1943, which was subsequent to the trial and judgment of conviction (R. 8, 80–81). Petitioner was apparently reclassified 4–F because of his conviction. See Selective Service Regulations, Secs. 622.61, 622.62.

ing and belief he was conscientiously opposed to participation in war in any form and he therefore claimed exemption from combatant training and service (R. 56). Finally, he stated that in his opinion his classification should be 4–D, as a minister (see Reg. 622.44 (a)) (R. 57).

In his own defense, petitioner testified that he had been a "regular minister" of Jehovah's Witnesses from 1930 until September 1, 1940, when he was appointed a "Pioneer minister" (R. 23–24). He was permitted to introduce in evidence, limited to the purpose of showing that he was a conscientious objector (R. 26–28), the special form for conscientious objectors which he filled out and filed with the local board (R. 63–66), to which he attached a document entitled "My Statement" (R. 69–70), and a certificate issued by the Watchtower Bible and Tract Society stating that petitioner was an "ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and is therefore one of Jehovah's witnesses" (R. 67). In the form, petitioner claimed exemption from participation in any service under the direction of military authority (R. 63). His statement set forth that he was recognized by the Watchtower Bible and Tract Society "as a full-time publisher known as a 'Pioneer,'" and elaborated the creed of Jehovah's Witnesses, concluding with a request "for classification (4–D) for complete exemption" (R. 69–70).

The court excluded as having no bearing on the issues in the case another certificate issued by the Watchtower Bible and Tract Society on October 7, 1941, declaring that petitioner was a "duly ordained minister of the Gospel * * * authorized to represent the Society and preach 'this Gospel of the Kingdom,' proclaiming the name of Jehovah God and Christ Jesus his King" (R. 29, 71).

Petitioner offered to prove that—

> When the defendant went down to the Board to have his hearing—the Local Board under which he was registered—four members were present, and when he announced that he was one of Jehovah's Witnesses one of the Board members, who is a minister, or purports to be, said, "I do not have any damned use for Jehovah's Witnesses." He attempted to produce evidence by affidavits from the Watch Tower Bible and Tract Society and from his work that he had done, as well as the scriptural authority from the Bible, and the Board stated, "We have no time to listen to this," and he was dismissed. [R. 33.]

In addition, petitoner offered to prove that he was reputed to be an ordained minister of religion; that he was a "Special Pioneer" appointed by the Watchtower Bible and Tract Society and was required to devote 175 hours per month to his work; that he regularly conducted Bible study classes and engaged in house to house work; and that at all

times since his registration under the Selective Training and Service Act of 1940 he spent his entire time in ministerial work (R. 35; see also R. 36–37). This proffered evidence was excluded as irrelevant (R. 33, 35–36).[2]

In his charge the trial judge instructed the jury, *inter alia,* that petitioner's classification in Class 4–E as a conscientious objector was binding upon the court and jury, and that if petitioner

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[2] The court also excluded the following documents which petitioner offered: petitioner's letter to the local board dated September 8, 1942, in response to the Board's notice to him of suspected delinquency (R. 31, 61), in which petitioner requested the board "to reconsider my case and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV–E" (R. 30–31, 62); a letter from the Watchtower Bible and Tract Society, dated May 21, 1942, addressed to M. W. Acheson, the hearing officer of the Department of Justice who heard petitioner's claim for exemption as a conscientious objector (see Sec. 5 (g) of the Selective Training and Service Act of 1940, 50 U. S. C. Appendix 305 (g)), concerning petitioner's standing with the Society (R. 29–30, 77); a statement signed by petitioner outlining his standing with the Society and requesting reclassification as a minister (R. 30, 72) (this statement bears no date and is addressed "To whom it may concern;" it is marked as an exhibit in the hearing before Mr. Acheson and apparently was submitted to him (R. 72)); a statement concerning his work which petitioner gave to an agent of the Federal Bureau of Investigation (R. 31–32, 78–79); and three affidavits of other persons, dated in May 1942, stating that petitioner was a "Pioneer" for the Society (R. 30, 73, 74–75, 76). Apart from the question of their relevance to the issues, the *ex parte* affidavits were properly rejected as not being the best evidence of the matters contained therein (R. 30).

had any legal objection to his classification he could have had it judicially determined by reporting to the local board and then applying for a writ of habeas corpus (R. 41). Petitioner's exceptions to the charge (R. 42) were overruled, as were his requested instructions that the jury should acquit if they found that the "Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing" (R. 42), or if they found that petitioner was "a regular and/or duly ordained minister of religion, and that the Local Board and Board of Appeals had knowledge of this from the evidence presented" (R. 42–43).

Petitioner was convicted (R. 43, 80) and he was sentenced to imprisonment for five years (R. 48, 80–81). On appeal to the court below, the conviction was affirmed (R. 100–101) on the authority of the earlier decision of the court in *United States* v. *Grieme*, 128 F. (2d) 811, in which the court held that "The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary or capricious manner are not defenses to a prosecution under the Act for a failure to comply with the board's order" (p. 815).

ARGUMENT

In his petition for a writ of certiorari, petitioner seeks to raise the question whether, in the criminal prosecution for failure to respond to the

order to report for work of national importance, he had a right to assert as a defense that he was a minister of religion and therefore exempt from training and service under the Selective Training and Service Act of 1940 and that the local board acted arbitrarily and capriciously in considering the matter of his classification (Pet. 9–11, 18–19).[3] We submit, however, that the evidence offered by petitioner and rejected by the trial court was insufficient to raise any such issue.

In his Selective Service Questionnaire petitioner claimed both the complete exemption from service accorded by the Act to ministers of religion (Sec. 5 (d)) and the exemption from combatant service accorded to conscientious objectors (Sec. 5 (g)) (R. 56). In addition, in the special form for conscientious objectors which petitioner filed with the local board, he claimed the exemption from participation in any service under the direction of military authorities (Sec. 5 (g)) (R. 63). It was for the local board to determine these claims, subject to the right of administrative appeal afforded by

[3] The question, in substance, is like that sought to be raised in *Bowles* v. *United States*, No. 589, this Term. In that case, however, Bowles claimed to be a conscientious objector and was ordered to report for induction for military service. In this case, petitioner was classified as a conscientious objector and was ordered to report for work of national importance. Thus the argument advanced by Bowles that erroneous classification should be allowed as a defense in a criminal prosecution because reporting for induction would violate conscientious scruples is inapplicable here.

the Act (Sec. 10) and the Selective Service Regulations (Sec. 627.2).

Insofar as petitioner's proffered evidence related solely to a contention that his classification was erroneous as lacking supporting evidence, that issue was, in any event, an issue of law which was not for the jury to decide. See *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, Nos. 387–388, decided February 8, 1943, this Term.

Petitioner's assertion of error, however, is also grounded upon his offer to prove that the *local board* arbitrarily denied him a hearing and refused to "listen to" affidavits from the Watchtower Bible and Tract Society and "from his work that he had done, as well as the scriptural authority from the Bible" (R. 33). But this offer was irrelevant. The record shows that the ultimate administrative decision in respect of petitioner's classification was made, not by the local board, but by the *board of appeal*. Upon petitioner's appeal from the local board's 1–A classification, the appeal board on January 24, 1942, classified him in Class 1–A, "subject to question of conscientious objection" (R. 58). In accordance with the special procedure upon appeal provided by Section 5 (g) of the Act and Regulation 627.25 for registrants who claim exemption as conscientious objectors, the appeal board on the same date referred petitioner's case to the Department of Justice for an advisory recommendation concerning the character and good

faith of his objections to participation in war (R. 58).[4] It is evident from this action of the appeal board that it considered and rejected petitioner's claim to exemption as a minister (see Reg. 627.25 (a)).[5] Several months later, on June 17, 1942, the appeal board classified petitioner in Class 4–E (R. 58).

As we pointed out in our brief in the *Bowles* case, pp. 20–21, the action of the appeal board in the Selective Service system is essentially a *de novo* classification. It must examine the appeal of a registrant upon the information contained in the registrant's file (Reg. 627.24 (b)), and if that information is not sufficient to enable the appeal board to determine the registrant's classification,

[4] See pp. 36–38, 71–79 of Brief for the United States in *Bowles* v. *United States*, No. 589, decided May 3, 1943, rehearing denied, June 7, 1943, for a description of the procedure on appeal by persons asserting conscientious objections. Under this procedure the registrant is entitled to a hearing before a Hearing Officer of the Department of Justice and he may present any pertinent evidence.

[5] All members of the Jehovah's Witness sect claim to be either full-time or part-time "ministers." The Watchtower Bible and Tract Society is at the head of the movement and it "'ordains' these Witnesses by furnishing each * * * a certificate that he is a minister of the Gospel." See p. 4 of the dissenting opinion of Mr. Justice Jackson in *Douglas et al.* v. *City of Jeannette (Pa.) et al.*, decided May 3, 1943; see also *Rase* v. *United States*, 129 F. (2d) 204, 208–209 (C. C. A. 6); *Buttecali* v. *United States*, 130 F. (2d) 172, 174 (C. C. A. 5). In practice, Selective Service classifies as ministers only those Jehovah's Witnesses whose names appear on a list prepared for Selective Service by the Watchtower Bible and Tract Society.

the file is returned to the local board with proper instructions (Reg. 627.23). In transmitting the file to the appeal board the local board "should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision" (Reg. 627.13 (a)). The appeal board "shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant" (Reg. 627.26 (a), and see Reg. 623.21). In the case of a registrant claiming conscientious objections, the matter, as we have noted, is referred to the Department of Justice for hearing and recommendation. The classification of the appeal board is final, except where an appeal is taken to the President (Reg. 627.26 (b)). It is clear, therefore, that the classification of the appeal board supersedes the local board's classification. Accordingly, the decision of the local board and any irregularity on its part in deciding a registrant's classification is without significance when his case has been decided by the appeal board.

Petitioner did not at the trial attack the action of the appeal board, except insofar as he sought to show that he was a minister. His offer of proof was directed solely to the action of the local board in allegedly denying him a hearing and refusing to listen to documentary evidence concerning his

status with the Watchtower Bible and Tract Society. His offer did not specify the precise nature of this evidence and, contrary to the implication of his argument (Pet. 5), he did not offer to prove that the local board refused to receive it or, what is more important, that it was not before the appeal board. On the contrary, the evidence admitted and offered at the trial indicates that all pertinent evidence relating to petitioner's ministerial status was before both the local board and the appeal board. In his Selective Service Questionnaire and conscientious objector's form, petitioner gave the details of his standing with the Society and he attached to the form the Society's certificate that he was an "ordained minister of Jehovah God" (R. 67) and a lengthy statement of his own relating the creed of Jehovah's Witnesses and his position among them and with the Society (R. 69–70). In addition, in his reply of September 8, 1942, to the local board's notice to him of suspected delinquency in failing to present himself for work of national importance (R. 61), following his final classification by the appeal board in Class 4–E, petitioner requested the local board to reconsider his case "and all of my documents which have been directly or indirectly forwarded to the Board because the Board has erred in classifying me in IV–E" (R. 62).[6]

[6] It should be noted that the affidavits of other persons which petitioner sought to introduce at the trial are dated

Furthermore, even if the local board did refuse to receive material evidence, its action would not have foreclosed petitioner from presenting such evidence to the appeal board, for Regulation 627.12 provides that on his appeal the registrant "may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and *may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.*" [Italics supplied.] Thus it will be seen that an administrative remedy is expressly provided to protect against occurrences such as petitioner alleges. Petitioner did not offer to prove that, assuming he was prevented from presenting evidence to the local board, he could not or did not take advantage of the remedy provided in Regulation 627.12. And, indeed, as we have noted, the record indicates that the material sought to be shown to the local board was considered by the appeal board.

In this state of the record, petitioner's offer of proof was inadequate to raise the question he seeks

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in May 1942 (R. 73–76), at the time his case was before the Department of Justice (see R. 58). They are marked as exhibits by the Hearing Officer of the Department and apparently were obtained for his consideration.

to present for determination by this Court. Even assuming, *arguendo*, that the local board acted irregularly in classifying petitioner in Class 1–A, its determination was superseded by the final action of the board of appeal in classifying him in Class 4–E, and there was no offer of proof that the appeal board acted arbitrarily, or that in consequence of the local board's allegedly arbitrary action the appeal board did not have before it all pertinent evidence which petitioner had to offer. Cf. *Bowles* v. *United States*, No. 589, decided May 3, 1943, rehearing denied, June 7, 1943.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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